3. The mere fact that a subject has been detained under the law as to preventive detention following his acquittal in a Criminal Court does not *ipso facto* render his detention wrongful.

4. Exceptionally, the courts will review the order for preventive detention if:

   (a) *mala fides* is alleged; or,

   (b) it is alleged that the grounds of detention stated in the order do not fall within the scope and ambit of the relevant legislation; or,

   (c) it is alleged that a condition precedent for the making or the continuance of the order of preventive detention has not been complied with.

For the reasons stated, this application is dismissed.

Application dismissed.

Solicitors: *Balasundaram & Co.*

SET KON KIM v. OFFICER IN CHARGE, CERAS POLICE STATION

[O. Cr. J. (Mohamed Dzaiddin J.)
August 19-23 & 26, 1983]
[Kuala Lumpur – Criminal Application No. 9 of 1983]

Criminal Law and Procedure – Habeas Corpus – Extradition – Ad hoc extradition of fugitive criminal at request of foreign country – Authentication of foreign warrant – Speciality rule – Undertaking by foreign government – Whether alleged offence is extradition crime – Identity of applicant – Particulars of offences in recital of committal order – Whether extradition would be unjust or oppressive – Criminal Procedure Code, (F.M.S. Cap. 6), s. 365 – Extradition Ordinance, 1958, ss. 3, 3A, 5, 10 & 15

In this case the applicant had been ordered to be detained on a warrant of committal issued by the Magistrate to face ten charges which had been preferred against him under the State of Victoria Crimes Act, 1958. The applicant applied for a writ of *habeas corpus* under section 365 of the Criminal Procedure Code.

Held: (1) in cases of this nature there is power in the superior court to review the case as it appeared before the Magistrate not only to look at the evidence before the Magistrate but to consider whether any magistrate, properly applying his mind to the question, could reasonably have come to the conclusion that a strong and probable presumption of guilt has been made out which would justify the Magistrate in making the committal order.

(2) section 3A of the Extradition Ordinance, 1958 is intended to provide for an *ad hoc* extradition of a fugitive criminal at the request of a foreign country in respect of which there is no extradition treaty or any other arrangements with this country in complying with the provisions of the Extradition Ordinance 1958 as if there is in force in respect of that foreign country an order under section 3(1). The order made by the Magistrate for Home Affairs in this case under section 3A of the Ordinance was valid;

(3) in this case the documents were in one bundle and as such the authentication by the offical seal of the Attorney-General of Australia relates to all the annexed documents in the bundle. The mode of authentication by affixing just one official seal to all the annexed documents was sufficient. The foreign warrants and the depositions disclosing the alleged crimes were, therefore duly authenticated;

(4) in regard to the speciality rule, it is sufficient that there is an undertaking by the foreign government that the principle of speciality is guaranteed;

(5) the alleged offences of criminal breach of trust were extradition offences;

(6) the applicant in this case was properly and adequately identified in the committal proceedings;

(7) although there were insufficient particulars of the offences mentioned in the first recital to the committal order, this was a defect in form and and an order should be made to direct the committal Magistrate to make the necessary amendments;

(8) the court cannot grant a writ of *habeas corpus* to a person detained on a warrant of extradition under the Extradition Ordinance, 1958, on the ground that it will be unjust or oppressive to return him to the country seeking his return.

Cases referred to:

(1) *Andrew s/o Thamboosamy* v. *Superintendent of Pudu Prisons* [1976] 2 M.L.J. 156
(2) *Chua Han Mow* v. *Superintendent of Pudu Prison* [1980] 1 M.L.J. 219, 221
(3) *Re Low Kuan Meng* [1962] M.L.J. 265
(4) *Re Osman* [1954] M.L.J. 237
(5) *Public Prosecutor* v. *Ng Goh Weng* [1979] 1 M.L.J. 127
(6) *Yeap Hock Seng* v. *Minister for Home Affairs* [1975] 2 M.L.J. 279, 281

CRIMINAL APPLICATION.

Lee Lim Huat (*Yusuf Khan bin Ghows Khan* with him) for the applicant.

Zaki bin Tun Azmi (*John O'Hara* with him) for the respondent.

Cur. Adv. Vult

Mohamed Dzaiddin J.: On July 27, 1983 at Jalan Duta Magistrate's Court, Set Kon Kim, the applicant, was ordered to be detained at Balai Polis Lock-up Ceras on a warrant of committal issued by the Magistrate pending his extradition to Melbourne, Victoria, Australia, to face

ten charges which had been preferred against him under the State of Victoria Crimes Act 1958.

He has now applied to this Court for writ of *habeas corpus* under Section 365 of the Criminal Procedure Code. His application is supported by the affidavit of his counsel, Mr. Lee Lim Huat, affirmed on the August 8, 1983 which sets out several grounds why this Court should direct that the applicant be set at liberty.

In the same application, the applicant applied for bail pending the outcome of this hearing. I have, however, at the outset of this proceeding disposed off this application. I held that I did not have any power to grant bail as nowhere in Part VIII Chapter 36 of the Criminal Procedure Code was there such a power given. See: *Andrew s/o Thamboosamy* v. *Superintendent of Pudu Prisons*[1].

Mr. Lee, for the applicant, has posed a number of issues which need to be considered, including a new ground not taken up at the committal proceeding but as an alternative ground to other questions in his application. However, before dealing with them, I have to remind myself that in cases of this nature "it has been held that there is power in the superior court to review the case as it appeared before the Magistrate, not only to look at the evidence before the Magistrate, but to consider whether any Magistrate, properly applying his mind to the question, could reasonably have come to the conclusion that a strong and probable presumption of guilt has been made out which would justify the Magistrate in making the committal order" – *Halsbury's* Laws of England, 4th Edition, Volume 11, para 1473. With regard to the function and powers of the committing magistrate in an extradition proceeding, see the judgment of Raja Azlan Shah C.J. (as he then was) in *Chua Han Mow* v. *Superintendent of Pudu*[2] at page 221 citing with approval *Re Low Kuan Meng*[3]; *Re Osman*[4]; and *Public Prosecutor* v. *Ng Goh Weng* [5].

Let us now consider the various grounds submitted by Mr. Lee. First, it is said that the order made by the Minister of Home Affairs Malaysia (Exhibit P.1) under section 3A of the Extradition Ordinance 1958 is bad because it has not been proved that there was such an arrangement between Malaysia and Australia under section 3(1). Section 3A reads as follows:

"Where a foreign country in respect of which no Order has been made under subsection (1) of section 3, or in respect of which such an Order has been made but it is not in force, makes a request for the extradition thereto of a fugitive criminal of that country, the Minister may personally, if he deems it fit to do so, give a special direction in writing that the provisions of this Act be applied in relation to the extradition thereto of that particular fugitive criminal as if there is in force in respect of that foreign country an Order under subsection (1) of section 3."

Mr. Lee contended that the effect of section 3A was to overcome section 3(1), which I agree; and that being the case, he went a step further and argued that the question of arrangement must be imported into section 3A, for without such arrangement, the order P.1 is bad. In my judgment, such an arrangement is not necessary under section 3A. Adopting what was said in *Chua Han Mow's case (supra)*, 3A is intended to provide for an *ad hoc* extradition of a fugitive criminal at the request of a foreign country in respect of which there is no extradition treaty or any other arrangement with this country in complying with the provisions of the Extradition Ordinance 1958 as if there is in force in respect of that foreign country an order under section 3(1).

Secondly, counsel has submitted that the foreign warrant of arrest (Exhibit P.3B and P.3C) was not duly authenticated to comply with section 10(1) and section 15 of the Ordinance. Section 10 requires the foreign warrant authorising arrest to be duly authenticated and section 15 provides the mode of authentication, i.e. by the oath of some witness or by being sealed with the official seal of the Minister of Justice or some other Minister of State. Section 15 reads as follows:

"Foreign warrants and depositions or statements on oath, and copies thereof, and certificates of or judicial documents stating the fact of a conviction, shall be deemed duly authenticated for the purposes of this Ordinance if authenticated in manner provided for the time being by law or authenticated as follows:

(a) if the warrant purports to be signed by a Judge, Magistrate or officer of the foreign country where the same was issued;

(b) if the depositions or statements or the copies thereof purport to be certified under the hand of a Judge, or officer of the foreign country where the same were taken to be the original depositions or statements, or to be true copies thereof, as the case may require; or

(c) if the certificate of or judicial document stating the fact of conviction purports to be certified by a Judge, Magistrate or officer of the foreign country where the conviction took place;

and if in every case the warrants, depositions, statements, copies, certificates and judicial documents (as the case may

be) are authenticated by the oath of some witness or by being sealed with the official seal of the Minister of Justice or some other Minister of State. And all Courts in the Federation shall take judicial notice of such official seal and shall admit the documents so authenticated by it to be received in evidence without further proof."
(The emphasis is mine).

Mr. Lee has contended that being a penal statute, section 15 must be construed strictly and because of the words "and if in every case" followed by a comma used after each word "warrants, depositions, statements, copies," each of the documents mentioned must be separately authenticated by the oath of some witness or, in this particular case, sealed with the official seal of the Attorney-General of Australia. Looking at the documents P.3B and P.3C, I find as a fact that they were included together with other relevant documents and depositions in a blue file folder (Exhibit P.3) with the following legend:–

"In the matter of the request for the extradition from Malaysia to the Commonwealth of Australia of Kim Kon Set".

P.3 contained the following documents: (1) list of names of witnesses; (2) notes of evidence and exhibits in relation to proceedings for applicant's extradition held at Melbourne Magistrate's Court on 12th and 13th December 1979; (3) ten informations under section 148 of the Crimes Act 1958 (as amended); (4) outline of charges against the applicant; (5) a resume of the criminal law in force in Victoria and, lastly, a copy of the Extradition (Commonwealth Countries) Acts 1966-1973. All these documents were tied at the top left hand corner with a piece of green ribbon fastened to the blue folder stretching out to the front cover and attached therewith a piece of white paper bearing the official letterhead of the Attorney-General of Australia and sealed with an official seal of the Attorney-General of Australia. There is typed on the white paper the following words: "Given under my hand and official seal affixed to all the annexed documents on February 23, 1983" and followed by the signature of the Attorney-General of Australia.

In my opinion, the requirement of section 15 is that the foreign warrant shall be deemed duly authenticated if authenticated in manner provided by law or by the fact that they purport to be signed by a Judge or Magistrate or officer of foreign country when it was issued and to be witnessed on oath or being sealed with the official seal of the Minister of Justice or some other Minister of State. The purpose of the authentication is to establish the genuineness of these documents. The effect of the words "and if in every case" is that such warrants, depositions, statements and copies thereof independently by themselves would require authentication. In the instant case, these documents are in one bundle and, as such, the authentication by the official seal of the Attorney-General of Australia relates to all the annexed documents in the said bundle. In my judgment, after having addressed myself to the requirement of section 15 and its proper interpretation given, the mode of authentication by affixing just one official seal to all the annexed documents is sufficient. In short, they were properly authenticated. For the same reason, it is also my finding that the depositions disclosing the alleged crimes were duly authenticated.

Thirdly, Mr. Lee has submitted that section 5(2) relating to specialty rule has not been complied with by the Government of Australia. He stated that the evidence in the committal proceeding disclosed there was no treaty or arrangement providing for the application of the specialty rule. The letter of undertaking (Exhibit P.4) given by the Australian High Commissioner in Malaysia to the effect that the Government of Australia had agreed to be bound by section 5(2) was contrary to the said section. Further, he stated that no expert evidence were adduced to prove that there existed a municipal law in Australia relating to specialty rule. I think, I ought to emphasise here that the specialty rule is a mandatory provision that has to be observed by the Courts in the foreign countries before a fugitive criminal can be surrendered to a foreign country. Hence, section 5 of the Ordinance contained such restrictions and section 5(2) provides that a fugitive criminal shall not be surrendered to a foreign country unless provision is made by the law of that country *or* by arrangement that the fugitive criminal shall not, until he has been restored or had an opportunity to return to Malaysia, be detained or tried in that foreign country for any offence committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is granted.

Mr. Lee went on at great length to submit that as there was no such arrangement, the undertaking in P.4 did not comply with section 5(2). With respect, I find that the requirement of section 5(2) has been established because there is provision

made by the laws of Australia. It is not necessary that there must be expert evidence to prove this. This Court is competent to look at the Australia Extradition (Commonwealth Countries) Act 1966 to enable it to come to a finding that the object or intention of the section in the Act is similar to our section 5(2). A copy of the Australian Statute was annexed to the bundle P.3 which was duly authenticated. And also the said section was also reproduced and explained in the deposition of Mr. Denis Grace annexed to P.3. Now, having studied section 22 of the Australian Act, in my judgment, there is provision made by the law of Australia on the principle of specialty. In fact, P.4 which is a note from Government to Government fortifies my conclusion of the existence of the specialty rule in section 22 of the Australian Act. It can also be regarded as a guarantee from the Government of Australia through the Australian High Commissioner in Kuala Lumpur to Wisma Putra that the Australian Government would undertake to apply the specialty rule in compliance with our Ordinance to cases of extradition from Malaysia to Australia. After all, adopting the words of Raja Azlan Shah C.J. (as he then was) in *Chua Han Mow's case* at page 222, "But for the purpose of satisfying the requirement of section 5(2) of the Ordinance, it will be sufficient if there can be found somewhere an undertaking on the part of that foreign country that the principle of specialty is guaranteed". In the circumstances of my above finding, the argument on the meaning of "arrangement" in section 5(2) in the context of international law becomes academic.

Before considering the last ground, which Encik Yusof Khan has submitted as an alternative ground, there are four other matters which I should briefly deal with. The first matter relates to the question of the alleged offences not being extradition crime. It was further submitted that the laws under which the applicant was charged was the particular law of the State of Victoria and not the general laws of the Commonwealth of Australia. Upon reading the deposition of Mr. Denis Grace of counsel for the Victorian Law Department and the outline of charges against the applicant annexed to P.3, I am satisfied that the offences alleged to have been committed by the applicant constitute an offence of criminal breach of trust by an agent or bailee punishable under section 409 of our Penal Code, which is one of the crimes within the meaning of "extradition crime" of section 2 of the Ordinance. I find no merit in counsel's argument about the offences being peculiar to the State of Victoria *vis-a-vis* the Commonwealth of Australia. It may be true that the offences come under the provision of Victoria Crimes Act 1958, but surely this must also be within the general laws of Australia.

On the question of the identity of the applicant, I am satisfied after looking at the notes of the committal proceeding that he was properly and adequately identified. Counsel also appeared to make a big issue regarding the decision of the committal Magistrate in refusing him to subpoena Mr. John O'Hara, alleging that the applicant was deprived of an opportunity to call a vital witness to determine the discrepancy in the content of P.3 I think this is just a storm in a tea-cup.

The last matter is regarding the content of the committal order dated July 27, 1983. Here, after examining the order, I agree that there are insufficient particulars of the offences being mentioned in the first recital in the order. However, this is only a defect in form and I can no doubt make an order directing the committal Magistrate to make the necessary amendments so as to include the material particulars of the offences.

Lastly, on the final and alternative ground, Encik Yusof Khan has persuaded me to grant the writ of habeas corpus on the ground that the extradition of the applicant to Melbourne would be, having regard to all the circumstances of the case, unjust or oppressive by reason of the passage of time since he is alleged to have committed the offences. For authorities on this ground, Encik Yusof Khan relies on English precedents, e.g. commentaries on Order 54 r. 1 in 1982 *White Book*, Volume I, page 883.

I think it should be emphasised here that the above ground is a creation of statute as provided under the English Fugitive Offenders Act 1967 section 8(3). The Criminal Procedure Code merely gives this Court a discretion to grant the writ of *habeas corpus*, although it has been said elsewhere that this is a writ of right against which no privilege of person or place can be of any avail. (See *Yeap Hock Seng* v. *Minister for Home Affairs, Malaysia*[6].)

The question here is whether the Court can grant a writ of *habeas corpus* to a person detained on a warrant of extradition under the Extradition Ordinance 1958 on the ground that it would be

unjust or oppressive to return him to the country seeking his return. Contrary to what I have expressed in the course of the proceeding, my answer is "no". This Court has no power to do so. Section 365 of the Criminal Procedure Code gives power to the High Court to direct persons detained under the Extradition Ordinance or the Commonwealth Fugitive Criminal Act 1967 be set at liberty. The section does not specify on what grounds can they be set free. The Extradition Ordinance 1958 does not provide the power. This is different in the case of the Commonwealth Fugitive Criminal Act 1967, where section 27 of the Act empowers the Minister if it appears to him that by reason of trivial nature of the case or application for surrender or return is not made in good faith or in the interest of justice or being made for political reasons or any other reason, it is unjust or inexpedient to surrender the fugitive criminal, the Minister may by order stay any proceedings and direct any warrant issued or endorsed to be cancelled and the person be discharged.

For the above reasons, this application for *habeas corpus* is refused. I also direct that the warrant of committal (Form D) be remitted to the committal Magistrate for him to amend the first part of the order to include the proper crime or offences under the Australian Crimes Act 1958.

Application dismissed.

Solicitors: *Yusuf Gulam Lee & Co.*

PAVONE v. PUBLIC PROSECUTOR

[A.Cr. J. (Edgar Joseph Jr. J.) September 5 & 6, 1983]
[Penang – Criminal Appeal Nos. 18 and 22 of 1983]

Criminal Law and Procedure – Trafficking in dangerous drug – Accused found in possession of powdery substance – Investigating officer after testing substance indicated substance was opium – Government Chemist subsequently certifying that substance was heroin – Evidence by investigating officer – President of Sessions Court rejected evidence of Investigating Officer – Report of Government Chemist accepted but he was not called to give evidence – President ruling there was a case to answer – Accused elected to remain silent – Question at close of prosecution case – Conviction set aside – Retrial ordered – Criminal Procedure Code (F.M.S. Cap. 6), ss. 173, 399 & 422.

In this case the appellant had been convicted in the Sessions Court upon a charge of trafficking in a dangerous drug, to wit 402 grammes of heroin and sentenced to life imprisonment. At the trial evidence was given that the Investigating Officer tested a sample of the subtance found on the accused and gave his opinion that the subtance was opium. Subsequently the substance was sent to the Government Chemist who examined the substance and certified it was heroin. The learned President of the Sessions Court said she attached no weight to the evidence of the investigating officer, as there was no evidence that he had even the most basic training in chemistry. She relied on the certificate of the Government Chemist and ruled that there was a case to answer. When the appellant elected to say nothing she observed she had no alternative but to find him guilty as charged. The investigating officer was not examined as to his competence nor was the Government Chemist called to testify in court.

Held: (1) the sole question at the close of the case for the prosecution was whether or not a *prima facie* case has been made out, that is to say, whether there was some evidence (not inherently incredible) which, if believed established the essential elements of the offence charged. If there is such evidence, then the defence must be called, but care must be taken to leave suspended the question of the veracity and accuracy of recollection of witnesses until after the close of the case for the defence;

(2) in this case the learned President had determined the issue of the veracity and recollection of witnesses for the prosecution before she called upon the defence. This was clearly wrong as it amounted to a provisional verdict of guilty thus raising the question whether the appellant was deprived of the substance of a fair trial. However, having regard to the compulsive nature of the evidence for the prosecution, which was uncontradicted by the defence, the misdirection was of no consequence, as the learned President would on a proper direction have still convicted;

(3) the learned President was perfectly entitled to prefer the Chemist's report to the evidence of the investigating officer but she has to go about this task correctly by probing the subject of the investigating officer's competence;

(4) the conviction must be set aside and a retrial ordered.

Cases referred to:

(1) *Public Prosecutor* v. *Man bin Abas* 1 M.C. 160.
(2) *Haw Tua Tau* v. *Public Prosecutor* [1981] 2 M.L.J. 49.
(3) *Ragunathan* v. *Public Prosecutor* [1982] 1 M.L.J. 139
(4) *Re Adam Aman; Hoesin bin Ghani* v. *Public Prosecutor* [1958] M.L.J. 229
(5) *Sia Soon Suan* v. *Public Prosecutor* [1966] 1 M.L.J. 116.
(6) *Rex* v. *Howe* 2 M.C. 109, 110.

CRIMINAL APPEAL.

Karpal Singh for the appellant.

Bazain bin Idris, (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Edgar Joseph Jr. J.: At the conclusion of the arguments yesterday I said I would deliver judgment today which I now do.